Supreme Court, U.S.
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No. 95-1255

In The

Supreme Court of the United States

October Term, 1995

JOHN J. SHELSTAD, CHARLES E. MINSHEW and KEITH A. WATSON,

Petitioners,

v.

WEST ONE BANK (IDAHO) f/k/a THE IDAHO FIRST NATIONAL BANK, a national banking association; *et al.*,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF TO BRIEF OF RESPONDENTS

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ARGUMENT

I. THE PETITION FOR CERTIORARI WAS TIMELY FILED.

Respondents suggest that the Petition for Certiorari was not timely filed. This argument is incorrect as a matter of law.

To support their argument – an argument which they failed to raise before the Ninth Circuit – the Respondents rely on two inapposite cases. In *Gypsy Oil Co. v. Escoe*, 275 U.S. 498 (1927), this Court stated that, pursuant to the rules which existed in 1927, the time to file a petition for certiorari runs from the denial of the second petition for rehearing, if it is properly and timely filed. 275 U.S. at 499. In *Morse v. United States*, 270 U.S. 151, 153 (1926), the Court quoted the then-existing rule as requiring that no second motion for a new trial may be submitted after the decision on the first motion for new trial unless the Court grants leave to file a second motion. A review of the current rules does not suggest that there is any similar restriction on filing petitions for rehearing.

In fact, the second petition for rehearing was taken from the Amended Memorandum entered by the Ninth Circuit, which itself resulted from the first petition for rehearing. The Respondents have not cited to or quoted from any rule prohibiting a petition for rehearing after the Ninth Circuit issues an Amended Memorandum. To suggest that the Petitioners have no opportunity to seek a rehearing on an amended memorandum would exalt form over substance.

II. SECTION 455 IS SELF-EXECUTING AT ALL TIMES.

Respondents suggest that Section 455(a) is self-executing only until the Petitioners inform the Court of the facts, known to the Court and to the Respondents, which mandate recusal. Respondents suggest that once Petitioners learn of the facts that were concealed from them,

and which the Court neglected to disclose, the self-enforcement provision of Section 455(a) vanishes. At that point, according to the argument of the Respondents, the burden of enforcement of judicial integrity shifts to the Petitioners and recusal is mandated only upon the filing of a written motion restating what the Court acknowledged that it knew all along. This suggestion is a reflection of the perverse approach to justice that the Respondents employ to avoid any scrutiny of their actions by a Court which has neither actual bias, nor any appearance of bias.

The fallacy – and inherent danger – of the Respondent's argument is exemplified by the comments of Judge Lodge during the only occasion in this case where he chose to go on the record with his position. During the February 2 chambers conference, Judge Lodge stated that he was sensitive to the requirements of Section 455(a) and that he had been deciding West One cases since he had come to the federal bench. He expressed that he had "duty to sit" on all of the cases involving the Respondents in the District of Idaho because the other sitting U.S. District Court Judge had disqualified himself from all cases involving West One due to a conflict. App. L at 84-85. *Cf. In re School Asbestos Litigation*, 977 F.2d 764, 784 ("a district judge has no 'duty to sit' and . . . may not sit where his or her impartiality may reasonably be questioned and the parties refuse to waive that objection." *See* H. R. Rep. No. 93-1453, 1974 U.S. C.C.A.N. at 6355).[1]

As the Respondents admit, Judge Lodge asserted that he knew of the employment of all three of his relatives for

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[1] Nevertheless, the record does not suggest that Judge Lodge, despite his sensitivity to Section 455, ever requested an advisory opinion from the Advisory Committee on Codes of Conduct of the Judicial Conference of the United States. He also never felt comfortable enough to disclose these relationships to the litigants before him.

over a year before Petitioners learned of these relationships. App. L pp. 84-85. Respondents acknowledged that it was the Court's obligation to make "the initial determination whether there is any basis for disqualification." App. L at 80-81. Respondents let the Court know that they intended to do everything in their power to continue its subterfuge:

> This case has been around a long, long time. I'm confident that the Court did not see any basis for disqualification by stirring up this hornet's nest, going off and making a bunch of depositions trying to make a big deal.
>
> I wonder if Plaintiffs are the ones giving the appearance of some type of impropriety.

Id. Respondents stated that the Petitioners' inquiry "was a witch hunt we don't want to participate in this late in the case." *Id.* Needless to say, the Ninth Circuit Court of Appeals did not view this inquiry as a "witch hunt." However, it also erroneously concluded that so full and frank a discussion of the issues on the record was not sufficient to mandate the Court's self-executing obligation to ascertain and review the facts and recuse itself if appropriate.

III. JUDGE LODGE WAS REQUIRED BY SECTION 455(B)(5)(b)(i) TO KNOW HIS SISTER-IN-LAW'S POSITION WITH THE RESPONDENTS.

Section 455(B)(5)(b)(i) required Judge Lodge to know precisely the nature and extent of his sister-in-law's employment relationship with a party to the case. That inquiry would be necessary so as to determine whether disqualification was mandated, and could not be waived, Section 455(e), because a "person within the third degree of relationship to either of them or the spouse of such a person . . . is . . . an officer, director or trustee of a party." His failure to do so is a separate violation of 11 U.S.C. Section 455. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 867-868 (1986).

IV. RESPONDENTS' CASES DO NOT SUPPORT THEIR POSITION.

Respondents' reliance on *In re Cargill, Inc.*, 66 F.3d 1256 (1st Cir. 1995), is badly misplaced. In *Cargill*, the First Circuit denied a petition for writ of mandamus. The *Cargill* Court ruled that, under the circumstances, the issue of the judge's impartiality could be decided on direct appeal, at the end of the case, rather than by mandamus sought immediately after the judge denied a motion to recuse. The *Cargill* Court specifically stated:

> An end-of-case appeal is a matter of right, while mandamus is a matter of discretion. Courts have frequently found that difference dispositive in analogous circumstances. *See, e.g., Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34, 101 S. Ct. 188, 189-90, 66 L. Ed. 2d 193 (1980) (per curiam); *In re Bushkin Assocs.*, 864 F.2d 241, 244 (1st Cir. 1989). And, moreover, the fact that a lengthy trial has intervened will not rob an appeal of its effectiveness. *See, e.g., Stauble v. Warrob, Inc.*, 977 F.2d 690 (1st Cir. 1992) (vacating judgment on direct appeal following 35-day trial, despite the circuit court's earlier denial of mandamus relief on same grounds).

Cargill, 66 F.3d at 1264, n.10.

Cargill, if anything, supports the Petitioners' position rather than Respondents'. Unlike the present case, Cargill at one time expressly waived, pursuant to 28 U.S.C. Section 455(e), the grounds he later asserted in his motion to recuse. 66 F.3d at 1264. Not even these Respondents assert that the Petitioners ever affirmatively waived Judge Lodge's conflict. Second, the *Cargill* trial court acknowledged his obligation to disclose potential disqualifying factors and seek a waiver from the parties as a precondition to continue. *Id.* at 1265 (Appendix). Here, Judge Lodge never suggested he had to disclose any of these relationships, or any other relationship he had with Respondents. He denied on three occasions that there

were any disqualifying factors. He never requested, let alone received, a waiver of the conflict.

Similarly, *United States v. Nobel*, 696 F.2d 231, 236 (3rd Cir. 1982), also supports the Petitioners' position by recognizing that an in-chambers conference is sufficient to put the Court and all parties on notice of disqualifying factors and compel appropriate action. In contrast to *Nobel*, there can be no suggestion that the Petitioners did anything other than demonstrate that Judge Lodge should recuse himself, and Judge Lodge recognized that fact by refusing on three occasions during the in-chambers hearing to do so. The Ninth Circuit determined unanimously that the grounds discussed at the in-chambers hearing and formalized in the Petitioners' written motion constituted grounds for recusal. Two of the three members of the Ninth Circuit panel refused to accept the in-chambers conference as sufficiently presenting the issues to Judge Lodge.

Respondents' reliance on *Phillips v. Amoco*, 799 F.2d 1464 (11th Cir. 1986) also is misplaced. In contrast to the facts of this case, the *Phillips* Court determined *unanimously* that the district court *did not* abuse its discretion in refusing to recuse itself. In contrast to this case, there is no suggestion that the moving party had immediately informed the trial court, formally or informally, that it had any concerns about the appearance of partiality.

V. PETITIONERS ARE NOT JUDGE SHOPPING.

Respondents suggest that Petitioners are attempting to judge shop by waiting until the Court issued an adverse decision and then moving for recusal. This contention bears no resemblence to the facts of this case. The Petitioners fought vigorously to keep this case in the forum that they chose – the state courts of Idaho. They did so by seeking to have the case remanded. Upon the denial of their timely motion to remand, the Petitioners requested Judge Lodge to certify the defective removal issue for interlocutory appeal – a request which Judge

Lodge denied. Following this denial by Judge Lodge, the Petitioners filed a writ of mandamus with the Ninth Circuit to have the case remanded to where it belonged. All of this took place before the Petitioners learned of Judge Lodge's intimate relationship with the defendants. And at no time during these proceedings did Judge Lodge apprise the Petitioners of the employment relationships of his close relatives.

Plaintiffs presented an adequate factual basis for disqualification on the record in February 1993. They did not hide the ball or the facts waiting to see if Judge Lodge might later render a favorable ruling.

VI. THERE IS NO TIMELY MANIFESTATION BY OTHER DEFENDANTS TO WEST ONE'S REMOVAL PETITION.

Respondents assert, without any citation to the Appendix, that West One Bancorp timely manifested its consent to the removal petition. Respondents Brief at p. 23. This contention is wrong and not borne out by the record in this case. The record is clear that only West One consented to removal, and that is not enough to allow the removal of this case from the state court where it belonged.

Respondents seek to create a legal fiction that the acts of one legal entity are the acts of all related entities. Given the ease with which any party can truly manifest consent – signing the petition or filing any written document, stating "I consent to removal" and signed by an appropriate agent or officer of the corporation – this legal fiction need not be created. This legal fiction takes away the right of a legal entity to not consent.

28 U.S.C. Section 1447(c) provides for the remand of a matter to state court on the basis of any defect in removal procedure. It establishes a limited thirty-day period of time to seek remand based upon a defect in procedure. As the overwhelming case law concludes, the statute does not give the court discretion to not remand if the

removing parties had failed to meet the requirements of remand.

Section 1447(c) mandates the remand of the case at *any* time it appears that the Court does not have jurisdiction. As the overwhelming majority of cases state, the failure to have all defendants join in or consent to removal renders removal defective and mandates remand. The removal statute requires defendants to file or join in a removal petition "within thirty days after receipt by the defendant, through service or otherwise, a copy of the initial pleading setting forth the claim for relief . . . or within thirty days after the service of summons upon the defendant . . . whichever period is shorter." 28 U.S.C. Sections 1441(a), 1446(b).

Congress has specifically allowed courts to expand the time in which removal may be had in specific circumstances. See 28 U.S.C. Section 1441(d) ("where removal is based on this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.") In all other instances, Congress has chosen not to expand time limitations in which a party must comply with the removal statute. This Court, and all federal courts, should respect Congress' choice.

The decisions cited by Respondents demonstrate a lack of respect for state sovereignty and for congressional limitations on judicial power. The Eleventh Circuit in *Belasco v. W.K.P. Wilson & Sons, Inc.*, 833 F.2d 277, 282 (11th Cir. 1987), decided that remand was not necessary because of the novelty, complexity, and technicality of issues raised. Congress did not create an exception to the remand statute on these grounds, although it certainly could have done so. Congress could also have granted federal courts exclusive jurisdiction over the novel complex technical questions at issue in *Belasco*, if it believed state courts could not handle those issues. If Congress did not do so, courts should not ignore their statutory limitations to achieve that result.

Other courts have chosen to ignore the literal language of the removal statute, in favor of a liberal reading of the federal rules of civil procedure, and a general statute allowing amendments to cure defective allegations of jurisdiction, 28 U.S.C. Section 1653. *Barrow Development Co. v. Fulton Insurance Co.*, 418 F.2d 316 (9th Cir. 1969); *LaNeave v. North American Life Assurance Co.*, F. Supp. 1453 (D. Minn. 1986). However if, as all courts agree, the time limit for removal is not jurisdictional in nature, then Section 1653 is simply inapplicable. There is no basis for an untimely amendment designed to have additional parties join in or consent to a removal petition.

Ironically, in many of those cases, as in this case, courts deny the motion for remand citing the "great waste to judicial resources" which would result from remand. But the time limits the statute imposes are specifically designed to make sure that there is no waste of either state or federal judicial resources. If courts strictly apply the removal and remand statutes, as this Court's rules of statutory construction continually mandate, then the issue is decided within a short time of filing. By refusing to honor the statutory mandates, courts force the terrible waste of resources which they insist they are trying to avoid. They force the violations of one party's right to choose a state court forum in order to benefit parties which have otherwise failed to qualify for the right to choose a federal forum. Courts should not so cavalierly ignore the statutory limitations Congress has imposed, based upon its collective wisdom.

To the extent that Respondents' cases allow courts or defendants to waive a Plaintiff's statutory right to remand, these cases are clearly in conflict with the language of the statute, the vast majority of decisions on the issue and creates a conflict among the circuits.

CONCLUSION

For the reasons stated herein, this Honorable Court should grant certiorari, on either or both of the issues raised. Alternatively, this Honorable Court should summarily reverse the decision of the Ninth Circuit and order the case remanded to state court, or at least that all of Judge Lodge's orders be vacated and presented to another judge having no conflicts under Section 455.

RESPECTFULLY SUBMITTED this 19th day of April, 1996,

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